BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2011-243-C; -244-C; -245-C; -246-C - ORDER NO. 2012-74

JANUARY 26, 2012

IN RE:	Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable and Farmers Telephone Cooperative, Incorporated	ORDER DENYING PETITION FOR RECONSIDERATION
	Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable and Fort Mill Telephone Company d/b/a Comporium Communications	
	Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable and Home Telephone Company, Incorporated	
	Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC d/b/a Time Warner Cable and PBT Telecom, Incorporated d/b/a Comporium Communications	

This matter comes before the Public Service Commission of South Carolina ("the Commission") on the Time Warner Cable Information Services (South Carolina) ("TWCIS," "the Company," or "Time Warner") Petition for Reconsideration of Commission Order No. 2011-765. This Order ruled on four arbitration matters with rural

local exchange companies ("RLECs"). TWCIS states in its Petition that this Order was contrary to federal law and inconsistent with this Commission's prior orders, in that we held that TWCIS was not a telecommunications carrier for federal purposes, even though it holds a state telecommunications Certificate issued by this Commission. The Company takes the position that, because of its State certification, it is also a telecommunications carrier for federal purposes, and therefore, has direct interconnection rights with the Rural Local Exchange Carriers (RLECs). We disagree with the Company's arguments, and therefore deny the Petition. In doing so, we note that the Federal Communications Commission (FCC) has expressly declined to define interconnected Voice over the Internet Protocol ("VoIP") as a telecommunications service for purposes of federal law. Likewise, the FCC found Time Warner's Digital Phone service to be an "interconnected VoIP" service (i.e., a service that has not been classified as telecommunications service for federal purposes).

In a previous Order, (Order No. 2009-356(A)), this Commission addressed Time Warner's use of an underlying wholesale carrier for interconnection. Time Warner now is suggesting that Time Warner itself may be that underlying wholesale carrier, in essence providing wholesale services to itself. We believe that is an incorrect interpretation of Order No. 2009-356(A). In fact, not only did our Order contemplate and address only the use of an underlying carrier, but we also clearly and expressly intended our Order to be fully consistent with the FCC's *Time Warner Declaratory Ruling*.[1]

[1] *See* Order No. 2009-356(A) at 19.

In the *Time Warner Declaratory Ruling*, the FCC addressed a petition in which Time Warner Cable asked the FCC to declare that wholesale telecommunications carriers (in that case, MCI WorldCom Network Services, Inc. and Sprint Communications, L.P.) are entitled to interconnect and exchange traffic with incumbent local exchange carriers when providing services to other service providers, including VoIP service providers like Time Warner.[2] The FCC granted the petition, finding that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with ILECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.[3] The FCC further stated:

> In making this clarification, we emphasize that *the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers*, either on a wholesale or retail basis. We do not address or express any opinion on any state commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service.[4]

The FCC also emphasized that its ruling was "limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider."[5] Stated another way, the FCC made clear that the scope of its declaratory ruling was "limited to wholesale carriers that are acting as telecommunications carriers for purposes of their interconnection request."[6] Contrary to Time Warner's suggestion

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[2] *Time Warner Declaratory Ruling*, ¶ 1.
[3] *Id.*, ¶ 8.
[4] *Id.*, ¶ 14 (emphasis added).
[5] *Id.*, ¶ 16 (emphasis in original).
[6] *Id.*

that the *Time Warner Declaratory Ruling* and *CRC Declaratory Ruling*[7] somehow affirmed an "unequivocal right" of interconnected VoIP providers like Time Warner to interconnect with RLECs,[8] the FCC repeatedly emphasized that it was addressing a specific situation where a wholesale telecommunications carrier sought to exchange a third party carrier's interconnected VoIP service.[9]

Perhaps the clearest language in the order to refute Time Warner's suggestion that the FCC somehow intended to grant direct interconnection rights for retail VoIP providers is as follows: "We also make clear that we do not address any entitlement of a retail service provider to serve end users through such a wholesale arrangement ...."[10]

In fact, the *Time Warner Declaratory Ruling* addressed only an arrangement identical to the one Time Warner and Sprint are already operating under today. The FCC found that telecommunications carriers like Sprint who obtained interconnection *in their own right* as telecommunications carriers and wished to exchange third party VoIP traffic could do so. However, the FCC acknowledged and addressed the legitimate concerns of

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[7] *Petition of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Declaratory Ruling, FCC 11-83, (rel. May 26, 2011) (*CRC Declaratory Ruling*).

[8] *See* Tr. at 46.

[9] In fact, one of the cases cited by Time Warner Cable in its Petition before the FCC was this Commission's decision in Docket No. 2005-67-C regarding MCI's arbitration with Farmers Telephone Cooperative, Home Telephone Company, PBT Telecom, and Hargray Telephone Company. In that docket, we recognized MCI's right to interconnect for its own telecommunications purposes – an issue that the RLECs did not dispute. We did, however, find that MCI could not exchange third party traffic with the RLECs over the interconnection. We noted that non-telecommunications carriers were not entitled to interconnection under Section 251(a) of the Act, and that they should not be allowed to gain indirect interconnection, particularly in a situation where the interconnecting carrier seeks to avoid identification and compensation obligations associated with the third-party traffic. *See* Order No. 2005-544 at 7-8. MCI did not appeal that decision, but it was one of the bases for Time Warner Cable's Petition for a Declaratory Ruling before the FCC. While the FCC granted the Petition, it conditioned those interconnection rights in such a way as to address many of the concerns we and the RLECs voiced with respect to the indirect exchange of third party traffic (*e.g.*., requiring that a regulated telecommunications carrier take responsibility for the appropriate identification and compensation of all traffic).

[10] *Time Warner Declaratory Ruling*, ¶ 15.

incumbent LECs, particularly rural LECs, by placing certain conditions on the interconnecting telecommunications carrier. Specifically, the FCC conditioned interconnection rights on the wholesale carrier assuming responsibility for compensating the incumbent LEC for the termination of all traffic exchanged under the interconnection arrangement, and on the customer being able to port a number back from a VoIP provider.[11] The FCC also noted that nothing in its order diminished the ongoing obligations of wholesalers as telecommunications carriers, including compliance with any technical requirements imposed by the FCC or a state commission.[12]

To the extent Time Warner is suggesting that the *CRC Declaratory Ruling* somehow expanded upon the *Time Warner Declaratory Ruling*, this argument is also without merit. The arrangement at issue in both cases was the same – i.e., a proposed interconnection arrangement between a wholesale telecommunications carrier "in the middle" and an incumbent LEC, and the proposed exchange of interconnected VoIP traffic through that interconnection. The case did not involve or address direct interconnection by an interconnected VoIP provider, but instead addressed the exact same type of arrangement by which Time Warner is currently exchanging traffic with the RLECs through Sprint.

In the *CRC Declaratory Ruling* matter, the incumbent LEC argued that it did not have an obligation to interconnect with the wholesale telecommunications carrier at all, despite the *Time Warner Declaratory Ruling*, because, as a rural telephone company, the incumbent LEC was exempt from the interconnection obligations of Section 251(c) of the

[11] *Time Warner Declaratory Ruling*, ¶¶16, 17.
[12] *Time Warner Declaratory Ruling*, ¶ 16.

Act. The FCC held that the rural carrier must still interconnect with the wholesale telecommunications carrier (i.e., the carrier in the middle) under Section 251(a) and (b) of the Act. In other words, the FCC reaffirmed the *Time Warner Declaratory Ruling*, with the clarification that it also applied to rural telephone companies that hold rural exemptions. In the case before us today, the RLECs are already interconnected with Sprint pursuant to Section 251(a) of the Act and have never argued they are not obligated to do so. Notably, the FCC stated the following: "We reaffirm that VoIP providers may obtain access to and interconnection with the local exchange network through competitive carriers."[13]

Nor do the other cases cited by Time Warner affirmatively grant direct interconnection rights for retail VoIP providers, as Time Warner argues.[14] As RLEC witness Mr. Meredith states in his testimony, none of the cases deal with Section 251 interconnection.[15] In fact, one of the cases cited by Time Warner even holds that it would not necessarily be considered arbitrary if the FCC were to conclude that carriers were

[13] *CRC Declaratory Ruling*, ¶ 27.

[14] Time Warner witness Ms. Laine testified that "the FCC has unequivocally held that a state certificate of public convenience and necessity and a filing of a state tariff with a commission to demonstrate [sic] that a party is a telecommunications carrier, not just under state law but also under federal law, the federal Telecommunications Act." Tr. at 50-51.

[15] *See* Tr. at 105-110, distinguishing *IP-Enabled Services: E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 38, n. 128 (2005) (which dealt with access to E911 networks); *Fiber Technologies Network, LLC v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392, 3399 ¶ 20 (2007) (which dealt with pole attachment rights); and *Bright House Networks, LLC v. Verizon California Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 ¶ 39 (2008), *aff'd, Verizon California Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009) (which dealt with customer proprietary network information (CPNI) obligations).

telecommunications carriers for purposes of one section of the Act and not for purposes of another.[16]

It is perfectly logical to find that Time Warner is a provider of telecommunications service as defined in state law[17] for state purposes, but that it is not a provider of telecommunications service, and therefore not a telecommunications carrier, as defined in federal law for federal purposes.[18] The state and federal definitions, as well as the regulatory regimes, are different.[19]

Interestingly, while Time Warner argues that retail VoIP providers have an "unequivocal right"[20] to direct interconnection with incumbent LECs, and that this is "the normal practice,"[21] Time Warner's witness admitted that this is a new issue for them, in that Wisconsin and South Carolina are the only two states where Time Warner offers its VoIP service as a regulated service.[22]

We understand that Time Warner wants the flexibility to change its business partners, and we agree that it is appropriate for Time Warner to have that flexibility. We have not required and we are not requiring Time Warner to continue using Sprint. We are merely requiring Time Warner to continue using a wholesale telecommunications carrier, as defined in federal law for purposes of Section 251 of the Act, for interconnection. This is the same position we took in prior dockets and is fully consistent with the *Time Warner Declaratory Ruling* and the *CRC Declaratory Ruling*. The effect

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[16] *See Verizon California Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009).
[17] *See* S.C. Code Ann. § 58-9-10(15).
[18] *See* 47 U.S.C. § 153(46); 47 U.S.C. § 153(44).
[19] *See* Tr. at 103-104.
[20] Tr. at 46, line 3.
[21] Tr. at 71, lines 21-25.
[22] See Tr. at 74, lines 11-14.

of these FCC rulings and our certification order was not to prevent Time Warner from doing business, but to grant its request for certification and to provide an avenue for Time Warner to obtain interconnection with RLECs despite the unclassified nature of Time Warner's retail VoIP service. In fact, as RLEC witness Mr. Meredith pointed out, Time Warner has several options for continuing to offer its Digital Phone service in South Carolina, to include using Sprint, using any other underlying carrier that meets the conditions of Order No. 2009-356(A), or entering into a commercial arrangement with the RLECs for interconnected VoIP services outside the parameters of a Section 251 interconnection agreement.[23]

In regard to Time Warner's argument regarding a right to interconnect based on its ability to offer wholesale services, we fail to see how that is any different from the argument we rejected in 2005 that stepping into Sprint's shoes to obtain interconnection from RLECs and "provide" that interconnection to itself constitutes the provision of telecommunications service by Time Warner. See Order No. 2005-484 at 3-4. Time Warner did not provide testimony in support of this position in the present case. Nothing has changed, and we have no basis upon which to find that Time Warner's "ability to offer" wholesale services in the form of interconnecting with the RLECs is sufficient to justify the interconnection in the first place.

[23] Tr. at 130.

Because of the reasoning stated above, we deny the Petition for Reconsideration.

BY ORDER OF THE COMMISSION:

John E. Howard, Chairman

ATTEST:

David A. Wright, Vice Chairman

(SEAL)